

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

HARRY BURDICK,

Plaintiffs,

vs.

STATE OF NEVADA, et al.,

Defendants.

2:12-CV-00217-KJD-CWH

**ORDER**

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, has submitted a motion for leave to file excess pages and a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1) and has filed an application to proceed in *forma pauperis*.

**I. Application to Proceed *In Forma Pauperis* (#1)**

Based on the information provided by Plaintiff regarding his financial status, the Court finds that Plaintiff is unable to pre-pay the entire filing fee in this action. *See* 28 U.S.C. § 1915(b)(1).

**II. Screening Pursuant to 28 U.S.C. § 1915A**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged

1 violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42,  
2 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation  
4 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of  
5 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may  
6 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
7 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is  
8 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
9 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses  
10 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions  
11 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could  
12 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
14 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim  
15 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
16 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making  
17 this determination, the court takes as true all allegations of material fact stated in the complaint, and the  
18 court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d  
19 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than  
20 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404  
21 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed  
22 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*  
23 *v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is  
24 insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

25 Additionally, a reviewing court should "begin by identifying pleadings [allegations] that,  
26 because they are no more than mere conclusions, are not entitled to the assumption of truth." *Ashcroft*  
27 *v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). "While legal conclusions can provide the framework of a  
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1 complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual  
2 allegations, a court should assume their veracity and then determine whether they plausibly give rise to  
3 an entitlement to relief. *Id.* “Determining whether a complaint states a plausible claim for relief [is] a  
4 context-specific task that requires the reviewing court to draw on its judicial experience and common  
5 sense.” *Id.*

6 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua*  
7 *sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based  
8 on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or  
9 claims of infringement of a legal interest which clearly does not exist), as well as claims based on  
10 fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S.  
11 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 12 **II. Screening of the Complaint**

13 Plaintiff claims that his constitutional rights were violated when he was tried and  
14 convicted for crimes he previously negotiated dismissal of in exchange for a guilty plea to a lesser  
15 charge, exposing him to double jeopardy; that the statute of limitations on the charges has run before he  
16 was brought to trial; and that he received ineffective assistance of counsel at trial. Plaintiff seeks release  
17 from confinement and monetary damages. He names various state officials including the Nevada  
18 Attorney General, District Court Judge Diana Sullivan, Clark County District Attorney David Roger and  
19 Deputies District Attorney Marsh and Sweeney, Clark County Parole Officers Tanten and Patty and his  
20 trial counsel, Alternate Public Defender Hartsell, plus John Does 1-5.

21 The complaint must be dismissed. Claims, such as those presented in the instant  
22 complaint, which attack the validity of plaintiff’s conviction, should properly be brought in a petition  
23 for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).  
24 (“When a state prisoner seeks damages in a §1983 suit, the district court must consider whether a  
25 judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,  
26 if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or  
27 sentence has already been invalidated.”)

1 **III. Conclusion**

2 Plaintiff's complaint will be dismissed without prejudice as his claims sound in habeas  
3 corpus, not civil rights.

4 **IT IS THEREFORE ORDERED** that Plaintiff's Application to Proceed *in Forma*  
5 *Pauperis* is **GRANTED**. Plaintiff shall not be required to pay an initial partial filing fee. However,  
6 even if this action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C. § 1915(b)(2).

7 **IT IS FURTHER ORDERED** that the Plaintiff herein is permitted to maintain this  
8 action to conclusion without the necessity of prepayment of any additional fees or costs or the giving  
9 of security therefor. This Order granting *in Forma Pauperis* status shall not extend to the issuance of  
10 subpoenas at government expense.

11 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada  
12 Department of Corrections shall pay to the Clerk of the United States District Court, District of Nevada,  
13 20% of the preceding month's deposits to Plaintiff's account (inmate #13891), in the months that the  
14 account exceeds \$10.00, until the full \$350 filing fee has been paid for this action. The Clerk of the  
15 Court shall send a copy of this Order to the Finance Division of the Clerk's Office. The Clerk shall also  
16 send a copy of this Order to the attention of the Chief of Inmate Services for the Nevada Department of  
17 Corrections, P.O. Box 7011, Carson City, NV 89702.

18 **IT IS FURTHER ORDERED** that the Clerk shall detach and file the Motion for Leave  
19 to File Longer Complaint, which is **GRANTED**, and the civil rights complaint, which is **DISMISSED**  
20 **without prejudice**. The Clerk shall enter judgment accordingly.

21 DATED this 15 day of February, 2012.

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UNITED STATES DISTRICT JUDGE